

SILVER CONCEPT SDN BHD

a

v.

BRISDALE RASA DEVELOPMENT SDN BHD

COURT OF APPEAL, KUALA LUMPUR

b

GOPAL SRI RAM JCA

ABDUL KADIR SULAIMAN JCA

ALAUDDIN MOHD SHERIFF JCA

[CIVIL APPEAL NO: W-02-627-2001]

13 MAY 2002

c

CONSTITUTIONAL LAW: *Courts - Jurisdiction of Court of Appeal - Refusal by High Court to grant interim stay - Appeal against - Whether appellate court seised with jurisdiction to hear matter - Section 44 of Courts of Judicature Act 1964 and art. 121(1B) of Federal Constitution*

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CIVIL PROCEDURE: *Stay of proceedings - Application for interim stay - Refusal by High Court to grant interim stay - Appeal against - Whether appellate court seised with jurisdiction to hear matter - Costs - Whether appellant to bear costs of stay proceedings*

At the conclusion of a dispute between the appellant and the respondent, the latter applied for payment out pertaining to moneys it had paid into court and this was allowed by the trial judge. The appellant applied for a stay of that order as it intended to take the matter further. The trial judge sought a written application. The appellant then requested for an interim stay pending the preparation of the said application which was denied. An appeal was made to this court regarding the refusal of the interim stay coupled with an application for a stay pending appeal which was granted.

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The respondent contended that this court lacked the jurisdiction to decide on the order refusing the interim stay, it being non-appealable. As such, it claimed that it was entitled to costs incurred in relation to the stay proceedings before this court.

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Held:

Per Gopal Sri Ram JCA

[1] Section 67(1) of the Courts of Judicature Act 1964 ('the Act') confers the Court of Appeal with the jurisdiction to hear and determine appeals from any judgment or order of the High Court. This jurisdiction however is curtailed as per the restrictive words appearing in the said section which were taken to mean that the Act or some other written law, such as the Rules of the Court Appeal, may regulate the way in which the appeals

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- a* may be brought. Read together with art. 121(1B) of the Federal Constitution, no limitation may be placed upon the appellate jurisdiction of the court. (p 33 a, e & f)
- b* [2] Section 44 of the Act is confined entirely to applications to stay execution upon judgment. It empowers this court to make interim orders to preserve the integrity of an appeal or other proceeding which includes the very application under the section itself. As the said section confers original jurisdiction on this court, s. 43 of the Act does not apply and there is no requirement that a separate application to the High Court be made before a litigant may invoke the s. 44 jurisdiction of this court. (p 34 f & g)
- c* [3] In the present case, the appellant had undoubtedly the right to appeal as conferred by the Act and therefore ought not be punished in costs. (p 36 d)
- d* [4] The High Court should be flexible in the exercise of its discretion when deciding to grant a stay. A stay pending appeal granted by the High Court is not an admission by that court that it had erred in making the order which is the subject matter of the appeal. Neither would it be inconsistent with the decision that is proposed to be appealed. (p 36 f)
- e* [Court of Appeal seised with jurisdiction to hear matter; respondent's entitlement to costs denied.]

[Bahasa Malaysia Translation Of Headnotes]

- f* Pada pengakhiran suatu pertikaian antara perayu dan responden, pihak yang terkemudian telah memohon untuk mendapatkan pembayaran keluar berhubung dengan wang yang telah ianya bayar kepada mahkamah dan ini telah dibenarkan oleh hakim perbicaraan. Perayu telah memohon untuk satu penggantungan bagi perintah itu kerana ianya berniat untuk meneruskan perkara itu selanjutnya. Hakim perbicaraan meminta suatu permohonan bertulis. Perayu kemudiannya memohon penggantungan sementara menyediakan permohonan tersebut yang mana telah ditolak. Satu rayuan telah dibuat kepada mahkamah ini berhubung dengan penolakan penggantungan interim tersebut yang disertakan dengan satu permohonan untuk satu penggantungan sementara menantikan rayuan yang mana telah diberikan.
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- h* Responden menegaskan bahawa mahkamah ini tidak mempunyai bidangkuasa untuk memutuskan perintah yang menolak penggantungan interim tersebut, kerana ianya tidak boleh dirayui. Oleh yang demikian, ianya menuntut bahawa ianya adalah berhak kepada kos yang dialami berhubung dengan prosiding penggantungan tersebut di hadapan mahkamah ini.
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Diputuskan:
Oleh Gopal Sri Ram HMR

- [1] Seksyen 67(1) Akta Mahkamah Kehakiman 1964 ('Akta tersebut') memberikan Mahkamah Rayuan bidangkuasa untuk mendengar dan menentukan rayuan-rayuan daripada sebarang penghakiman atau perintah Mahkamah Tinggi. Bidangkuasa ini namun begitu telah dihadkan menurut perkataan-perkataan bersifat menghad yang terdapat di dalam seksyen tersebut yang mana dimaksudkan bahawa Akta tersebut atau sebarang undang-undang bertulis, seperti Kaedah-kaedah Mahkamah Rayuan, boleh melaraskan cara dalam mana rayuan-rayuan boleh dikemukakan. Dibaca bersama-sama dengan art. 121(1B) Perlembagaan Persekutuan, tiada penghadan boleh dikenakan ke atas bidangkuasa rayuan mahkamah.
- [2] Seksyen 44 Akta tersebut adalah tertumpu keseluruhannya pada permohonan-permohonan untuk menggantung perlaksanaan setelah penghakiman. Ianya memberi kuasa kepada mahkamah ini untuk membuat perintah-perintah interim demi untuk mengekalkan integriti sesuatu rayuan atau prosiding lain yang mana termasuk permohonan tersebut di bawah seksyen itu sendiri. Oleh kerana seksyen tersebut memberi bidangkuasa asal kepada mahkamah ini, s. 43 Akta tersebut tidak terpakai dan tidak terdapat kehendak bahawa satu permohonan yang berasingan kepada Mahkamah Tinggi dibuat sebelum seseorang litigan boleh menggunakan bidangkuasa s. 44 mahkamah ini.
- [3] Dalam kes semasa, perayu tanpa diragui mempunyai hak untuk merayu sepertimana yang diberikan oleh Akta tersebut dan oleh itu tidak harus dihukum mengikut kos.
- [4] Mahkamah Tinggi haruslah bersikap fleksibel dalam melaksanakan budibicaranya ketika memutuskan untuk memberikan suatu penggantungan. Sesuatu penggantungan sementara menantikan rayuan yang diberikan oleh Mahkamah Tinggi bukannya suatu pengakuan oleh mahkamah bahawa ianya telah tersalah pertimbangan dalam membuat perintah yang mana adalah halperkara rayuan tersebut. Ianya juga bukanlah tidak konsisten dengan keputusan yang dicadangkan untuk dirayui.

[Mahkamah Rayuan mempunyai bidangkuasa untuk mendengar halperkara; keberhakan responden kepada kos dinafikan.]

a Case(s) referred to:

Annamalai Chettiar v. Yeoh Kee Tin [1956] MLJ 49 (*refd*)

Cropper v. Smith [1883] 24 Ch D 305 (*dist*)

Jurutera Consultant (SEA) Sdn Bhd v. Eddie Lee Kim Tak [1999] 1 CLJ 564 (*refd*)

Penang Port Commission v. Kanawagi Seperumaniam [1997] 1 CLJ 423 & 434 (*refd*)

See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299

b (*refd*)

Shanmugam Pillai v. Panjali [1961] MLJ 290 (*dist*)

Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd [1999] 3 CLJ 377 (*foll*)

Legislation referred to:

Courts of Judicature Act 1964, ss. 43, 44, 67(1), 68(2), 73

c Federal Constitution, art. 121(1B)

Judicature Acts 1873-75 [UK], s. 19

Rules of the Court of Appeal 1875 [UK], O. 58 r. 16

For the appellant - VK Lingam (R Thayalan & VK Lashmi); M/s VK Lingam & Co

d For the respondent - KS Narayanan (Joginder Singh, CT Annathural, C Sabapathy, A Vishu Kumar & Tharminder Singh); M/s Logan Sabapathy & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S2(S1)22-09-1998]

Reported by M Maheswaran

e**JUDGMENT****Gopal Sri Ram JCA:**

This is the judgment of the court.

f This appeal raises a short point of procedure. Counsel for the respondent says that it is a point of much importance. With respect, my learned brothers and I do not agree. It is, we think, hardly likely to recur in the future.

The factual matrix against which the point arises need not be gone into in much detail.

g There were monies in court that had been paid in by the respondent. After the trial was over, the respondent applied for payment out. The judge allowed that. The appellant at once asked for a stay because it wanted to take the matter further. The judge asked for a written application to be made. The appellant said that it would do so, but requested an interim stay in the meantime. The judge refused the request. The appellant then appealed against the refusal of the interim stay and applied to this Court for a stay pending appeal. That application went before the late Wan Adnan Ismail PCA. His lordship granted an interim stay, which was later extended by this court. All relevant proceedings before us in this regard have since been withdrawn and **h** **i** the only question that remains for disposal is one of costs.

Counsel for the respondent has argued that it is entitled to all costs incurred with regard to the stay proceedings before this court because the order refusing the interim stay was non-appealable so that this court had no jurisdiction to deal with the matter in the first place. It is therefore contended that the only avenue available to the appellant was to appeal against the order directing the release of the monies from court and to move this court for a stay in those proceedings. Several authorities were cited to us in support of this argument. It is necessary to discuss only two of them.

In *Cropper v. Smith* [1883] 24 Ch D 305, the defendants in a patent action applied to the High Court to stay proceedings under the judgment entered against them. Chitty J refused that application and after the time limited to appeal against that order had expired, the defendants moved the Court of Appeal for a stay. Although that application was dismissed on its merits a preliminary question arose as to whether the appellant's motion was an appeal or an application. This is because appeals to the Court of Appeal in England are brought by notice of motion and not as here, by way of a notice of appeal. Had it been an appeal, it would have been out of time. The court interpreted the motion before it and came to the conclusion that it was not an appeal against Chitty J's order. It held that O. 58 r. 16 of the 1875 Rules conferred concurrent jurisdiction upon the High Court and the Court of Appeal to entertain an application for a stay. Rule 16 of the 1875 Rules is similar to s. 73 of our Courts of Judicature Act 1964. In essence, both provide that an appeal is not to operate as a stay of execution unless the High Court or the Court of Appeal may so order. It was in this context that Brett MR, after referring to O. 58 r. 16, said this:

By that rule it is assumed that the Court of Appeal has jurisdiction, and to my mind, according to the true reading of that rule, **not a jurisdiction by way of appeal merely**, but an independent jurisdiction, and if that rule had remained alone it would have been obvious to my mind that the application might have been made either to the Court appealed from or to the Court of Appeal. Then the 17th rule says that, 'Wherever under these rules an application may be made either to the Court below or to the Court of Appeal' (which in terms assumes that but for what is going to be said immediately afterwards it might be made either to the Court below or to the Court of Appeal) 'it shall be made in the first instance to the Court or Judge below.' That imposes a limitation on the action of the Court of Appeal, but a limitation not affecting its jurisdiction, and does not at all shew that the motion in the Court of Appeal is an appeal. On the contrary, the 17th rule seems to me to first assume, as the 16th rule did, that it is not an appeal, that there is an alternative jurisdiction, and alternative jurisdiction is of course co-ordinate. Then in order that the Court of Appeal and the Court below may not incur the risk of deciding in different ways as to staying proceedings without either of them knowing of the application to the other, the rule imposes this limitation, that although the

a jurisdiction is co-ordinate, and although it is alternative, yet the Court of Appeal will not exercise its jurisdiction until it knows whether the co-ordinate jurisdiction of the Divisional Court has been exercised and how. That seems to me to be the true reading of the 17th rule. (emphasis added).

b In *Shanmugam Pillai v. Panjali* [1961] MLJ 290, the Sessions Court at Seremban having made an order for possession in the landlord's favour refused a stay. The tenant appealed to the High Court against the order refusing the stay. Ismail Khan J held the procedure adopted to be an illegality and dismissed the appeal. He said:

c Mr. George for the respondent raised the preliminary objection that the step taken by the appellant in appealing against the refusal of the stay of execution is not warranted by any rule of procedure. He referred to Order 59 rule 12, which reads as follows:

d An appeal shall not operate as a stay of execution under the decision appealed against except in so far as the Court appealed from or the High Court may order, and any application for stay shall be made in the first instance to the Court appealed from.

e The Court below and the High Court have therefore a co-ordinate jurisdiction to entertain an application for a stay of execution but as regards the High Court, while it has an independent jurisdiction to stay proceedings, pending an appeal, it is not to exercise that independent jurisdiction until an application has been made to the same effect and decided upon in the Court below. The reason for this is that the High Court and the Court below may not, to use the words of Brett M.R. in the case of *Cropper v. Smith* [1883] 24 Ch D 305, at page 308, 'incur the risk of deciding in different ways as to staying proceedings without either of them knowing of the application to the other.' It is clear that on the refusal by the learned President of the application for a stay of execution the only other course open to the appellant would have been to apply to this Court in its original jurisdiction for a stay. Therefore, where a special procedure is prescribed, as in this case, by an application to the High Court to grant a stay of execution of a judgment in the Court below, pending appeal, I am not prepared to say that an entirely different step taken to achieve that object, as it has been done in this case by appealing against the refusal for a stay of execution by the Court below, is a curable irregularity. I have no power to convert an appeal into an application. I am reminded of Lord Herschell's judgment in *Smurthwaite v. Hannay* [1894] AC 494, at page 501 where his Lordship in speaking of a joinder of plaintiffs which is not authorised by the rules of procedure observed: 'If unwarranted by any enactment or rule, it is, in my opinion, much more than an irregularity'. In fact, in my opinion, the step taken by the appellant by way of an appeal is an illegality and I may say at once that Order 70 rule 1 has no application.

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Before expressing any view on the relevance of these cases to the present instance, it is necessary to hearken to some of the relevant statutory provisions. First, there is s. 67(1) of the Courts of Judicature Act 1964 (“the Act”). It says that this court has jurisdiction to hear and determine appeals “from any judgment or order of any High Court”. It is a very wide provision. There are limitations imposed by s. 68(2). But they are not relevant for present purposes. Section 67(1) itself contains a restriction. It will be dealt with in the appropriate place in this judgment.

My learned brothers and I are of the view that the words “any judgment or order of any High Court” in s. 67(1) should be read liberally. That is the way in which they were read by this Court in *Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd* [1999] 3 CLJ 377. If we accept Encik Narayanan’s argument, it would cut down the full effect of the section. It will limit the clear words of the section. We should not do that.

There is constitutional reinforcement for the view we take. Article 121(1B) of the Federal Constitution after creating the Court of Appeal confers jurisdiction “to determine appeals from the decisions of a High Court or a judge thereof” but not from a decision of the registrar of the High Court. The article goes on to say in effect that federal law may confer other jurisdiction. So, if we read s. 67(1) together with art. 121(1B), we can see at once that no limitation may be placed upon the appellate jurisdiction of this court.

We now turn to the words of restriction appearing in s. 67(1). They say that the jurisdiction is “subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought”. The critical words are those to which we have lent emphasis. Now, what do those words mean? In our judgment, they mean that the Act or some other written law, such as the Rules of the Court of Appeal, may only regulate the way in which the appeals may be brought. For example the Act or other written law may stipulate that appeals in particular cases require leave; or that a deposit of a fixed sum must be paid as security for costs when the notice of appeal is filed.

We will now address two other provisions of the Act, namely, ss. 73 and 43. The former confers concurrent jurisdiction on the High Court and this court to grant a stay of execution. The latter says that where an application may be made to the High Court or to this court, it must be made to the High Court in the first place. So, if an order is made to the prejudice of a litigant and a stay of that order is necessitated, then it is the High Court that must be moved for such a stay first before this court is approached. If, this court is moved for a stay without application having been made to the High Court in the first instance, this court should normally adjourn such application until s. 43 is

- a* complied with. In our view this is plain upon a joint reading of ss. 73 and 43. It is a view that derives some support from the judgment of Buhagiar J in *Annamalai Chettiar v. Yeoh Kee Tin* [1956] MLJ 49. That was a case in which Buhagiar J sitting as a single judge of the former Court of Appeal dismissed an application for stay on the ground that the High Court had not
- b* first been moved. This is a course we would not approve as it increases costs and inconveniences the court and parties. An adjournment of the motion for stay until after the High Court has been moved is in our view the proper order to make.

- c* We must now address s. 44 of the Act. It is an important provision. For that reason we will reproduce it.

- d* 44 (1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal.
- e* (2) Every application under subsection (1) shall be deemed to be a proceeding in the Court of Appeal.
- (3) Every order made under subsection (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed, varied or discharged by the Court.

- f* Now, it is significant that the section is markedly different from s. 73. The latter is much narrower. It is confined entirely to applications to stay execution upon a judgment. By contrast, s. 44 is far wider. It empowers this court to make interim orders to preserve the integrity of an appeal or other proceeding, including the very application under the section itself. (See sub-s. 2). Such interim preservation orders may take the form of an injunction or other relief designed – in the words of the section – “to prevent prejudice to the claims
- g* of parties”. Further, s. 44, unlike s. 73, does not confer concurrent jurisdiction on the High Court and this court. It confers original jurisdiction on this court. Hence s. 43 does not apply and there is no requirement that a separate application to the High Court be made before a litigant may invoke the s. 44 jurisdiction of this court. In other words, s. 44 is not to be read as being
- h* subject to s. 43.

- However, this Court has on several occasions treated s. 44 as governing applications for a stay of execution. See, *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299; *Penang Port Commission v. Kanawagi Seperumaniam* [1997] 1 CLJ 423 & 434; *Jurutera Consultant (SEA)*
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Sdn. Bhd. v. Eddie Lee Kim Tak [1999] 1 CLJ 564. Having carefully considered the relevant statutory provisions, my learned brothers and I have come to the conclusion that this is an unnecessarily restrictive view of s. 44 in the absence of any express or implied limitation imposed by the language employed by Parliament. Further, it is most unlikely that Parliament would have enacted two provisions governing the stay of execution. And if Parliament intended the s. 44 jurisdiction to be concurrently exercisable by this court and the High Court, it would have said so. Accordingly it is our view that an application to this court under s. 44 which is not in the nature of an application for a stay of execution may be made without the necessity of complying with s. 43 of the Act.

That brings us to the cases referred to earlier in this judgment. In our view these are readily distinguishable. *Cropper v. Smith* was decided after the passing of the Judicature Acts 1873-75. Section 19 of the 1873 Act provided as follows:

19. The said Court of Appeal shall have jurisdiction and power to hear and determine Appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice, or of any Judges or Judge thereof, subject to the provisions of this Act, and to such Rules and Orders of Court for regulating the terms and conditions on which such appeals shall be allowed, as may be made pursuant to this Act. For all the purposes of and incidental to the hearing and determination of any Appeal within its jurisdiction, and the amendment, execution, and enforcement of any judgment or order made on any such appeal, and for the purpose of every other authority expressly given to the Court of Appeal by this Act, the said Court of Appeal shall have all the power, authority, and jurisdiction by this Act vested in the High Court of Justice.

This section, though similar to our s. 67, is differently constructed in that the bringing of appeals is made expressly subject to rules of court. Further, the jurisdiction of the English Court of Appeal is dependant merely on statute whereas our jurisdiction is founded upon the terms of the Federal Constitution which declares itself as the supreme law of this country.

So far as *Shanmugam Pillai v. Panjali* is concerned, that was an appeal from a subordinate court to the High Court. Such appeals were governed (under the Courts Ordinance 1948) and continue to be governed (under the Act) by provisions entirely different from s. 67.

That brings us to the facts of the present case.

- a* We think that the circumstances here were really most exceptional. We will recount them. The judge had already ordered the monies to be paid out and then directed the making of a written application for a stay. In the meantime the appellant was left without any protection. Any written application would have been rendered academic if, pending the making or the hearing of that application, the monies were released. Hence the request for an interim stay.
- b* When that was refused as well, the appellant found itself in an invidious position.

- c* It was unable to apply to this court for a stay within the substantive appeal because the High Court had not refused a stay: all it had done was to simply require a written application. It is to meet this deadlock that the appellant lodged the present appeal and made the application we spoke of earlier. That it seems to us to have been driven entirely by the way in which the matter developed before the High Court. None of it was of the appellant's making.

- d* This is therefore a case where the appellant in the exercise of its undoubted right of appeal conferred by the Act came before this court. We can hardly punish it in costs for this.

- e* One final point. We would observe that all the several proceedings before us in the present case would have been unnecessary if the High Court had heard and decided on whether to grant a stay pending the appeal instead of requiring a formal written application being made. In that event, the matter could have been brought before this court and dealt with in the usual way. The grant by the High Court of a stay pending appeal is not an admission by that court that it had erred in making the order that is the subject matter of the appeal.
- f* Neither is it inconsistent with the decision that is proposed to be appealed. For this reason, the High Court should be flexible in the exercise of its discretion when deciding whether to grant a stay. This would considerably reduce the large volume of urgent stay applications that are constantly made to this court.

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